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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 108.

OHIO VALLEY NATIONAL BANK,
PLAINTIFF IN ERROR,

vs.

JOHN HULITT, RECEIVER OF THE FIRST NATIONAL BANK OF HILLSBORO, OHIO,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The suit was brought by the defendant in error as receiver of the First National Bank of Hilsboro, Ohio, to recover from plaintiff in error an assessment made by the comptroller of the currency upon the shareholders of that bank, and upon the claim that the plaintiff in error is the actual owner of twenty shares of its stock. The plaintiff in error, in substance, made a general denial.

The case was heard below upon an agreed statement of facts set forth in the Record, pages 8-10, and which is, substantially, as follows:

1. On March 18, 1893, one Overton S. Price borrowed of the plaintiff in error $10,000, for which he gave his note secured by collateral, part of which was twenty shares of the stock of the First National Bank of Hillsboro, Ohio, and thirty shares of the stock of the Dominion National Bank of Bristol, Virginia. The note gave plaintiff in error full power to sell the collateral at any place, at public or private sale, without notice to Price, and if such sale was public, plaintiff in error could purchase without being liable to account for more than the net proceeds. (Agreed Statement, Exhibit A, Record, pages 9-10.)

2. On December 25, 1893, Price died, having paid nothing on said note. No payments have since been made thereon except as hereinafter set forth.

3. "On June 18, 1894, the plaintiff in error made a formal transfer of said national bank stock to one Henry Oetjen, one of its employes, who was pecuniarily irresponsible." Said shares were, by said banks respectively, transferred upon their books to Oetjen, and certificates therefor were issued to and delivered to him on July 7, 1894. No money was paid to plaintiff in error for said transfer and none was expected. Plaintiff in error did not, at that time, make any credit upon said note by reason of said transfer. Plaintiff in error did not, at that

time, enter any credit on its books because of said transfer. Oetjen endorsed said certificates of stock in blank.

4. Said transfer was made upon the agreement between Oetjen and the plaintiff in error that he should hold said stock as a security for said debt of Price, applying anything he might get from the security upon the debt. Pursuant to this agreement Oetjen did pay over to plaintiff in error moneys received by him from time to time from said Dominion National Bank stock, until he sold it, whereupon the proceeds of such sale were likewise by him applied on said note.

5. On February 19, 1896, the plaintiff in error prepared proof of claim against Price's estate. At that time it indorsed upon said note a credit as follows:

"Forty-four hundred and eighty-four ($4484.00) dollars paid on account of within note, June 18, '94, being proceeds of sale of thirty shares stock Dominion National Bank and twenty shares of stock First National Bank of Hillsboro, O."

Plaintiff in error believed, at the time of making said credit, that said national bank stocks afforded a reasonable security in the amount so credited for Price's debt to it. Having made said credit, plaintiff in error filed its proof of claim against the estate of Price for the balance remaining upon said note less said credit. No consideration was paid for said credit, except as herein stated. All dividends from the estate of Price received by plaintiff in error have been applied upon the note.

6. The First National Bank of Hillsboro, Ohio, continued open until July 16, 1896. From the date of the transfer of said stock to Oetjen it appeared at all times in his name on the books of the bank. Nothing appeared, on said books, at any time, to indicate plaintiff in error had any interest in the same. Plaintiff in error did not exercise, or attempt to exercise, any right as a stockholder in said stock unless the matters herein set forth were, by legal intendment, of that character. Plaintiff in error caused said shares to be transferred to Oetjen because it was unwilling to assume the liability of a stockholder in respect to said shares.

BRIEF OF ARGUMENT.

The question to be determined is:

Upon the agreed facts is the plaintiff in error the actual owner of the shares of stock of the First National Bank of Hillsboro, Ohio, pledged to it by Price?

For the defendant in error it is submitted:

I.

Somebody must be the actual owner of the stock in question. There are but three possible owners: Price's estate, Oetjen, or the plaintiff in error.

Price's estate does not own it because: In the contract with plaintiff in error Price gave it a power of sale. (Pages 9-10, Record.) The plaintiff in error reported to Price's administrators an execution of this

power, first, by the credit upon the note from the proceeds of the sale of this stock; second, by the reduction of the amount of the claim in the amount of the proceeds of such sale; third, by receiving dividends from the estate of Price upon the balance of claim after such credit. (Record, pages 8, 9, 10, Agreed Statement.)

Price's administrators ratified such sale by acquiescence therein, as shown by payment of dividends upon claim of plaintiff in error as reduced by such credit.

Oetjen, while liable because held out as owner with his consent, is not the actual owner for these reasons: He paid nothing for the stock. By his express contract he only was ostensible owner for the benefit of the plaintiff in error, or Price's estate, or both. If he was a trustee for plaintiff in error, or Price's estate, or both, that trust was executed and terminated by the report of the sale evidenced by the credit on the note made in pursuance of the power given in the contract of pledge. If this power of sale was not exercised in the exact mode prescribed, *i. e.*, by public instead of private sale, that was waived by Price's estate by the acquiescence of his administrators. This acquiescence is shown by payment of dividends on Price's debt to the plaintiff in error reduced by the amount of the proceeds of the sale of stock as reported to them in the credit of $4484.06, placed on the note.

It follows, as we think, that plaintiff in error was, from the date of the presentation of its claim to Price's estate, reduced by the credit of the proceeds of the sale of the

stock, and the acceptance of the claim thus reduced, the actual owner.

The learned counsel for plaintiff in error states in the beginning of his argument this: "Defendant's indorsement on the note in 1896, referred to the transfer of 1894 as a sale. The parties have stipulated that it was not a sale, but a transfer by way of pledge."

We do not so understand the stipulation. The stock before it was transferred to Oetjen was in pledge to the bank. The transfer to Oetjen could hardly pledge it over again to the bank. And the transfer could hardly pledge it to Oetjen. Oetjen agreed, according to the stipulation, to hold the stock "as a security for the indebtedness of said Price upon said note." That is to say: Oetjen agreed with the bank that although the shares were, in form, transferred to him, the bank should not change its position in relation to them in fact, but should still have the benefit of them as security for its note.

The learned counsel for plaintiff in error, in the same connection, further states: "In other words, the parties have stipulated that there was no sale in fact, but at one time defendant had stated that there was a sale." We do not think this to be the meaning of the stipulation.

We have not claimed that there was a sale of the stock at the time of the transfer to Oetjen. The plaintiff in error filed its claim against Price's estate reduced by what it then said was proceeds of sale of the stock. Price's administrators accepted the claim thus reduced

and paid dividends on it which plaintiff accepted. This extinguished any rights Price's estate may have had. It extinguished such rights not by estoppel, but by acquiescence in a sale as reported to its representatives. If the plaintiff in error chose to date its credit on the note in 1894, instead of 1896, that could not alter the legal effect of what took place between plaintiff in error and the representatives of Price's estate. It seems to us that the argument of the learned counsel for plaintiff in error with relation to estoppel does not give weight enough to the fact that Price's estate accepted and acted upon what the plaintiff in error did in its credit upon the note and report of sale of the stock.

II.

This case is distinguished from the cases of

Rankin, Receiver, v. Fidelity Ins., Trust & Safe Deposit Co., 189 U. S., 241-2.
Pauly v. State Loan & Trust Co., 165 U. S., 606.
Anderson v. Philadelphia Warehouse Co., 111 U. S., 479.

If the plaintiff in error had done nothing more than put this stock in the name of its irresponsible servant, Oetjen, for the purpose of avoiding stockholder's liability, it may be that the law of the cases named would sustain it. But plaintiff in error did more than make Oetjen its and Price's estate's trustee, to hold this stock. After taking this step the plaintiff in error radically changed its position with relation to Price's estate. After it presented its claim against Price's estate reduced in

the amount of $4484.00 by proceeds of the sale of the stock, and after Price's estate acquiesced in this and in so doing put itself in a position that precluded it from making any claim to the stock, the plaintiff in error could hardly say that it, or its servant, Oetjen, was the trustee in any way for Price's estate.

For the reasons given in the dissent of Justice Miller, concurred in by Justice Matthews, in Anderson v. Warehouse Co., 111 U. S., 481, the law can not, we think, be well carried further in the direction of release of liability than it has been carried by the series of cases we have cited. We submit that the release of everybody concerned except the irresponsible Oetjen from stock liability upon the facts disclosed here would be a long step further in that direction.

It will be noticed from the amount of the credit on the note, and the fact that plaintiff in error believed at the time it made the credit that the stock was good security for that amount, that the plaintiff in error then placed a very substantial value on this stock. There were thirty shares of Dominion and twenty shares of First National, the par value of all which would be $5000.00. The credit was $4484.00. The credit was made February 19, 1896. The bank did not fail till July 16, 1896.

In Rankin v. Fidelity Ins. & T. & S. D. Co., *supra*, the question submitted to the jury was, "Whether before the Keystone National Bank failed, the defendant company, the Fidelity Trust Company of this city, was the real owner of these shares of stock, or whether it con-

tinued to be the pledgee of the stock—whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner,' or whether it had continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence." 189 U. S., 793.

The jury found the defendant in that case still pledgee. But in this case the plaintiff in error by its own act ceased to be pledgee.

In Pauly v. State L[illegible] & Trust Co., 165 U. S., 844, the question was th[illegible] *e.*, was the defendant still "a mere pledgee of [illegible] in a national bank." It was found that defendant was a pledgee only.

Can that be found in this case when the pledgor has ratified a sale of the pledge reported by the pledgee?

In Anderson v. Phila. Warehouse Co., the question was still the same—was the defendant "a mere pledgee," or had he become the real owner? The jury found that the defendant, by causing the stock to be held in the name of its irresponsible servant did not cease to be pledgee. The reviewing court, in the opinion by Justice Harlan, finds that "as between Blumer & Co."—the pledgors—"and the Warehouse Company"—the defendant—"Blumer & Co., or Kern"—Kern was a member of the firm of Blumer & Co.—"were the owners of the stock, and the company"—the defendant—"was the pledgee." But would the court have said this if the defendant in the case, the Phila. Warehouse Co., had reported to Blumer & Co., the pledgor, a sale of the stock and a reduction of

the debt for which the stock stood pledged in the amount of such sale, and if Blumer & Co. had acquiesced in and ratified the sale?

In each of these cases the holding rests upon the ground, as we understand, that the bank continued to be pledgee. That being held it follows that the pledgor continued to be pledgor. The irresponsible person to whom the stock was transferred had no relation to the stock as pledgor or pledgee. It can hardly be claimed that after the credit upon the note, the report of the sale of the stock and the acceptance thereof by Price's administrators that his estate remained pledgor. If Price's estate ceased to be pledgor by consequence plaintiff ceased to be pledgee. The ownership of the stock did not, certainly, get back into Price's estate after the sale reported to and ratified by his administrators. It is not claimed, as we understand, that Oetjen is or was the actual owner after the credit, report of sale and acceptance of the claim thus reduced by Price's administrators. Where, then, was the actual ownership if not in plaintiff in error?

III.

We submit the following as a test of the actual ownership of the stock in question:

If the First National Bank of Hillsboro had paid dividends after the credit on the note, and after the reception by the plaintiff in error of dividends on the note less such

credit from Price's estate, who would have been entitled to such bank dividends as owner of the stock?

Not Oetjen. He never had any right to dividends. Not Price's estate. His administrators, having acquiesced in and ratified the credit whereby their trust got value for the stock had no right.

It follows that the plaintiff in error would have been entitled to such dividends *as owner*. And if the plaintiff should, in the execution of his trust, be able to pay a dividend to the stockholders of this bank, the plaintiff in error would be entitled, as owner, to such dividend on the stock in question.

Respectfully submitted,

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